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No. 861 16

In the Supreme Court of the United States

OCTOBER TERM, 1946

PRIEBE & SONS, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinions of the Court of Claims (R. 33–40) are reported at 65 F. Supp. 457.

JURISDICTION

The judgment of the Court of Claims was entered on May 6, 1946 (R. 40). A motion for new trial was overruled on October 7, 1946 (R. 40). The petition for a writ of certiorari was filed on January 7, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether paragraph 7 of the "Announcement FSC–553" of the Agricultural Marketing Administration, providing for the assessment of liquidated damages for "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified", is an enforceable provision for liquidated damages and not a penalty.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of Announcement FSC–553 (R. 19–24), which by its terms, became a valid and binding contract between petitioner and the Federal Surplus Commodities Corporation upon the acceptance of petitioner's offer, are set forth in the Appendix, pp. 14–17.

STATEMENT

The facts as found by the Court of Claims may be briefly summarized as follows:

In April 1942, the Agriculture Marketing Administration (AMA), an agency of the Department of Agriculture, issued its "Announcement FSC–553" stating that it would consider offers for the sale of dried egg products (R. 19). The announcement further stated that its "terms and provisions * * * shall become a part" of any offer submitted and that upon acceptance of any such offer by the Federal Surplus Commodities

Corporation (FSCC), another agency of the Department of Agriculture, "the offer and acceptance shall constitute a valid and binding contract" (R. 19–20).

On April 22, 1942, petitioner submitted, by telegram, an offer to sell a large quantity of such products for delivery on various dates and at several shipping points. Included therein were 90,000 pounds "for delivery on or before May 18 * * * FOB. Sleepy Eye, Minnesota" and 110,000 pounds for delivery on or before the same date "FOB Manning, Iowa" (R. 24). The following day, AMA, by telegram, accepted petitioner's offer, enumerating the various poundages and delivery points, including 200,000 pounds for "May 18 delivery" (R. 24), and the next day, petitioner confirmed the contract, again referring to 200,000 pounds for "May 18 delivery" (R. 24). This proceeding involves only that portion of the agreement dealing with the 200,000 pounds at Manning, Iowa, and Sleepy Eye, Minnesota and, specifically, with 144,829 of the 200,000 pounds (R. 24–25).

Following the general procedure adopted for these and other deliveries, petitioner requested AMA to inspect the lots as the manufacture of the product was completed (R. 25). Pursuant to that request, an AMA representative visited petitioner's plant and made test weights and certain checks, such as the date of manufacture of the

powder and whether the barrels complied with the contract specifications and requirements as to markings; the representative also took samples of the various lots and forwarded them, together with his report, to the AMA laboratory at Chicago, Illinois (R. 25). The laboratory then analyzed and graded the powder for compliance with the contract specifications and issued a certificate setting forth, among other things, the results of the sampler's investigation and the laboratory analysis, and the contract involved (R. 25). The certificates were dated as of the dates of the completion by the laboratory of its analysis of the lots covered by the various samples (R. 25), which was, for the lots here involved, from May 20 to May 22 (R. 26, 27). Six certificates were issued covering these lots, 3 being dated May 20, 1 May 21, and 2 May 22 (R. 27).[1] Immediately upon such completion, petitioner was notified by wire as to the results of the laboratory analyses and the numbers of the AMA certificates covering the various lots (R. 25).

Respondent, by written notices dated May 26, May 29, and June 4, 1942, gave petitioner orders to ship "immediately" the various lots comprising

[1] Petitioner has nowhere suggested, nor does it now suggest, that the AMA inspection and analyses were not promptly completed, or that AMA in any way caused petitioner's failure to have the product here involved inspected and ready for delivery on May 18.

the 144,829 pounds (R. 26).[2] Petitioner shipped the lots referred to in the May 26 notice on the same day (R. 26); the lots referred to in the May 29 notice were shipped on June 2 (R. 26); and those referred to in the June 4 notice were shipped on June 5 (R. 26–27).

Subsequently, in accordance with paragraph 7 of Announcement 553, Appendix, pp. 15–16, the United States, by two deductions, deducted from undisputed balances owing to petitioner, the sum of $14,482.90 as liquidated damages of 10¢ per pound on these lots which were covered by the AMA inspection certificates dated May 20, 21, and 22 (R. 27–28, 29). Petitioner appealed the first deduction to the President of the FSCC, but its appeal was denied by the President after he first, however, referred the matter to a departmental committee for consideration and advice, and, subsequently, upon the renewal of the appeal, to the Solicitor of the Department of Agriculture. Both the unanimous Committee and the Solicitor recommended that the assessment not be remitted (R. 29).

Petitioner sued in the Court of Claims to recover the damages with interest (R. 1, 7) but

[2] Since FSCC requested the latter two deliveries after the expiration date of the ten day period provided, FSCC would have entertained a claim to reimburse petitioner for such excess costs as it may have incurred for storage beyond that period (R. 32). Petitioner has, however, made no such claim (R. 32).

that court held that petitioner was not entitled to recover and ordered the petition dismissed (R. 32).

ARGUMENT

The court below apparently accepted as valid the proposition urged by petitioner (Pet. 4, 12–16) that an agreement fixing damages for a future breach of contract at an amount which is not a reasonable forecast of just compensation for the injury anticipated from the breach would be a penalty and not enforceable. It held, however, that that proposition was not applicable in the present case, since, as it construed the contract, the liquidated damages provision here involved did not constitute a penalty (R. 38).

Petitioner attempts to attack that holding by relying on a construction of paragraph 7 which, it states, the court below adopted and which petitioner purportedly accepts for the purpose of the petition (Pet. 9, n. 2). According to petitioner, the court below construed paragraph 7 as containing an entirely separable provision which imposes liability for liquidated damages where the certificates were not ready on May 18 but were ready by the time delivery was demanded and made (Pet. 4, 9). Contrary to petitioner's statement, however, a reading of the decision below clearly demonstrates that that court did not so construe paragraph 7. In the court below, petitioner urged in effect the same construction

of paragraph 7 which it now suggests the court below adopted. (R. 36). The Court of Claims, however, rejected that contention, holding that "the language of paragraphs 1, 3, 4, 7, and 9 relating to the delivery date, inspection certificates and liquidated damage is very plain and unambiguous, and there is no room for construction" (R. 36). And in regard to the contention that the liquidated damage provision of paragraph 7 constituted a penalty in the circumstances of the present case, the court below said:

> We can find nothing in the contract or in the evidence which would justify the conclusion that the contract intended that the sum agreed to be paid would be liquidated damages if the eggs were called for on May 18 and were not then inspected and ready and would be a penalty if such eggs were not inspected and ready on that date but not called for prior to issuance of the required inspection certificate. On the contrary the circumstances and the language used by the parties negative such an interpretation of the contract. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118–122 (R. 38).

This conclusion, we submit, is correct. Paragraph 7 clearly provides for the assessment of liquidated damages for "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer." As the court below found, the phrase

"undelivered in accordance with the terms of this announcement" appearing in paragraph 9 must be read in the light of paragraph 7 and when so read, it is clear that the phrase meant the delivery date of May 18. (R. 37.) For, although under paragraph 7, FSCC was allowed a period of 10 days after the contract delivery date within which to call for shipment of products, "the particular day within the period being at the FSCC's option," it decided to make absolutely certain that the products would be inspected and ready for delivery by the "day specified in the offer" which was "the first day" of the "ten-day period" (paragraph 7)..

The reasons for the provision imposing liquidated damages for failure to have the product inspected and ready for delivery on the date specified in the contract are set forth in Findings 16 and 17, giving the history of the provision (R. 31–32), and may be briefly summarized as follows: Shortly after the Lend-Lease Act of March 11, 1941, 55 Stat. 31, was enacted, the Department of Agriculture, through the FSCC, embarked on a large-scale program of purchasing dried eggs to alleviate the food shortages of our European allies. FSCC had its operation scheduled on a monthly basis to meet its commitments to these countries. The program was, however, necessarily affected by the shipping situation and had to be correlated with it. Shipping space was at

a premium and it was imperative that no vessel depart with unfilled space because of the failure of a producer to have his product ready by the time specified in his offer. The urgency related to time and not considerations of cost. Much of the powder was shipped directly to vessels, but incoming vessels were often delayed in arriving. When the powder was first destined for shipment to a packaging plant for packaging in containers suitable for consumer use, it frequently happened that the plants would be operating at capacity and could not absorb any more powder. In addition, powder would sometimes be shipped to cold storage warehouses as an incident to the packaging program or to await incoming convoys. Occasionally, however, such warehouses would be filled to capacity. The purpose of allowing FSCC 10 days after the contract delivery date to accept actual delivery was to give FSCC some leeway in its program to meet these contingencies. Thus it was considered imperative at all times for the producer to have his product inspected and ready for delivery by the date specified in his offer, which was the first day of the 10-day period within which FSCC, at its option, could take actual delivery, so that FSCC could at all times be assured as to how much powder was available on a certain date for shipment out of particular places as incoming convoys arrived or as packaging and cold storage plant facilities opened up.

The planning of the entire operation was keyed to these dates, and FSCC considered it of prime importance to have the products inspected and ready for delivery by such dates.

If FSCC had needed the products on May 18 and they were not ready, the Government would be damaged by the resulting injury to the war effort which could not be measured in dollars and cents. In these circumstances, "it would be almost necessarily impossible to show what damages (if any) might or naturally would result from a failure to fulfill the contract." *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121. Especially in a Government contract for war supplies, this would be reason enough to uphold a stipulation for damages not unreasonable on its face. *Ibid.*; *Clydebank Engineering & Shipbuilding Co., Ltd.* v. *Castaneda*, [1905] A. C. 6. Consequently, the familiar earmark of a penalty—the fixing of amounts entirely disproportionate to the damage which might result—is not present and the provision herein involved is clearly a true liquidated damage provision. *Wise* v. *United States*, 249 U. S. 361, 365–367; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121; *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, 672–674. Cf. *Irving Trust Co.* v. *Perry Co.*, 293 U. S. 307, 311. Nor does the fact that the clause is also designed to assure and encourage compliance adversely affect

its validity. *Fidelity & Deposit Co.* v. *Walker,* 75 F. 2d 115 (C. C. A. 5). In a sense, all liquidated damage provisions are so designed. *Clydebank Engineering & Shipbuilding Co.* v. *Castaneda, supra,* at pp. 19–20.

Petitioner's basic complaint seems to be that that there was no actual delay in delivery when shipment was ultimately called for, that the Government was, therefore, not damaged, and that the contract should, accordingly, be construed as imposing liquidated damages only when there is a failure of shipment when requested and when there is, consequently, damage. But in considering whether a provision for liquidated damages is actually a penalty, it is not proper, after the default, to explore the question of whether in fact any damage flowed from the breach. The contract is viewed as of the time when the parties enter into it. *United States* v. *Bethlehem Steel Co., supra; Wise* v. *United States, supra; Frick Co.* v. *Rubel Corp.,* 62 F. 2d 765 (C. C. A. 2). That it turns out that there is no actual damage is immaterial. *United States* v. *Bethlehem Steel Co., supra; Byron Jackson Co.* v. *United States,* 35 F. Supp. 665 (S. D. Cal.). Indeed, the parties seeking to enforce a liquidated damage provision may even have benefited and profited by the de-default. The provision is nontheless enforceable. *Barnette* v. *Sayers,* 289 Fed. 567 (App. D. C.); *Blackwood* v. *Liebke,* 87 Ark. 545, 553.

Accordingly, in determining whether a provision for liquidated damages is in fact a penalty, it is necessary to seek the intention of the parties in the light of the circumstances existing at the time they entered into the contract (*United States* v. *Bethlehem Steel Co., supra; Sun Printing & Publishing Association* v. *Moore, supra*), and "the purpose the agreement seeks to subserve" (*Beiser* v. *Kerr,* 107 Ind. App. 1, 9). "When such intention is ascertained, it is ordinarily the duty of the court to carry it out" (*United States* v. *Bethlehem Steel Co., supra,* at p. 119). Furthermore, courts are no longer disposed to hold that agreed stipulations for liquidated damages—specifically declared to be so by the parties, as in the present case—are penalties. *Sun Printing & Publishing Association* v. *Moore, supra; Wise* v. *United States, supra; In re Outfitters' Operating Realty Co.,* 69 F. 2d 90, 92 (C. C. A. 2); *Hickey* v. *United States,* 65 C. Cls. 729, 737. In view of these fundamental principles, it is submitted that the provision of paragraph 7 is an enforceable provision for liquidated damages and not a penalty.

CONCLUSION

The decision below is correct, there is no conflict and no question of general importance is presented. The petition for a writ of certiorari should therefore be denied.

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FEBRUARY 1947.

APPENDIX

The pertinent provisions of the Announcement FSC–553 are as follows:

HOW TO SUBMIT AN OFEER

Offers * * * must state the following:

* * * * * *

b. The number of pounds * * * offered at each delivery point.

c. The beginning date of the delivery period during which the vendor agrees to make delivery (N. B. Par. 7—*Delivery*).

* * * * * *

TERMS AND CONDITIONS

* * * * *

PAR. 3. *Quality.*—Dried egg products delivered shall be those specified for each lot and shall conform to the following applicable specifications:

* * * * *

PAR. 4. *Inspection and Grading.*—(a) Inspection of the product intended for delivery shall be performed by the Agricultural Marketing Administration of the United States Department of Agriculture, and it shall be incumbent upon the vendor to arrange with the AMA for inspection services. Inspection and weight certificates shall be issued at the expense of the vendor. Inspection and weight certificates shall be dated not more than 30 calendar days prior to the delivery date specified in the offer. The lots delivered to the FSCC must be the

lots sampled and inspected by the AMA, and the grading certificates tendered the FSCC must name the manufacturer of the product, his identifying production lot number for the barrels in question, and the date of manufacture. Dried whole egg * * * manufactured more than 30 days prior to the delivery date specified in the offer will not be acceptable to the FSCC. In addition to the grading certificate, the vendor * * * must tender with each delivery an affidavit, on form prescribed, attesting to the date of manufacture of the product. * * *

PAR. 7. *Delivery.*—The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option. Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of Paragraph 9 below. The only exception against invoking the provisions of Paragraph 9 shall be when sampling and inspection by the Agricultural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer, pursuant to item C and the sampling and inspection services were not forthcoming.

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificate issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement. Vendors shall take whatever steps are

necessary to protect fully the dried egg products prior to delivery to the FSCC. Such protection within the prescribed delivery period shall be at the expense of the vendor.

Delivery shall be made at the point (or points) specified in the offer, f. o. b. railroad cars, or, at the option of the FSCC, f. o. b. truck or local warehouse specified by the FSCC.

* * * * *

PAR. 9. *Delays—Damages: Payment.*—Inasmuch as the failure of the vendor to deliver the quality of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below for each pound of dried egg product undelivered in accordance with the terms of this announcement.

Contracted Delivery Date (Date Specified in Offer):	*Liquidated Damage sum*
Within and including 50 days of Acceptance date	$0.10
51 to 115 days from acceptance date, inclusive	.15
116 to 180 days from acceptance date, inclusive	.20
181 to 245 days from acceptance date, inclusive	.25
246 to 311 days from acceptance date, inclusive	.30

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of esti-

mating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for such time as he deems reasonable under the circumstances and in view of the urgent needs of the purchaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor, and the determination of the President of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

Payment of vendor's invoice will be made as soon as practicable after submission of the correct claim or claims, and payment will be contingent upon compliance with conditions set forth in this announcement.

PAR. 10. *Contract of Sale.*—This announcement, together with the offer and acceptance, shall constitute the contract of sale between the vendor and the Federal Surplus Commodities Corporation.

U. S. GOVERNMENT PRINTING OFFICE: 1947